Supreme Court, U.S.
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No. 91-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,
Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a trustee, who has never objected to the debtor's claim of exemption, may attack that claim of exemption, years after the debtor's discharge, when § 522(l) of the Bankruptcy Code provides, unless a party in interest objects, what is claimed as exempt is exempt.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: Robert J. Taylor, as Trustee in the bankruptcy proceeding of Emily Davis; Freeland & Kronz, a partnership; Wendell G. Freeland; and Richard F. Kronz.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Appendix to the Petition for Certiorari

["Pet. App."], at 1a) is reported at 938 F.2d 420. The memorandum opinion of the United States District Court for the Western District of Pennsylvania (Pet App. 18a) is reported at 118 Bankr. 272; its order affirming the judgment of the bankruptcy court is unreported (Pet. App. 16a). The memorandum opinion of the United States Bankruptcy Court for the Western District of Pennsylvania (Pet. App. 30a) is reported at 105 Bankr. 288; its judgment (Pet. App. 28a) is reported at 105 Bankr. 294.

JURISDICTION

The court of appeals entered its judgment on July 9, 1991. The Petition for Writ of Certiorari was timely filed on October 7, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES AND RULES INVOLVED

Section 105 of the Bankruptcy Code, 11 U.S.C. § 105 (1988), provides in pertinent part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 522 of the Bankruptcy Code, 11 U.S.C. § 522 (1988), provides in part:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant by the entirety or joint tenant is exempt from

process under applicable nonbankruptcy law.

* * *

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item or $4,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $400 plus up to $3,750 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive --

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;
(B) a veteran's benefit;
(C) a disability, illness, or unemployment benefit;
(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the

support of the debtor and any dependent of the debtor, unless --

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
(ii) such payment is on account of age or length of service; and
(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

(11) The debtor's right to receive, or property that is traceable to --

(A) an award under a crime victim's reparation law;
(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor an any dependent of the debtor;
(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
(E) a payment in compensation of loss of future

earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

* * *

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

Section 1621 of Title 18 of the United States Code, 18 U.S.C. § 1621 (1988), provides in part:

Whoever -

* * *

(2) In any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true:

is guilty of perjury shall, except as otherwise expressly provide by law, be fined not more than $2,000 or imprisoned not more than five years, or both. . . .

Rule 1007, Federal Rules of Bankruptcy Procedure, provides in part:

(c) Time Limits. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions(d), (e), and (h) of this rule. . . . Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to §705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

Rule 1008, Federal Rules of Bankruptcy Procedure, provides:

All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.

Rule 1009, Federal Rules of Bankruptcy Procedure, provides in part:

(a) General Right to Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Rule 4003, Federal Rules of Bankruptcy Procedure, provides in part:

(a) Claim of Exemptions. A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(b) Objections to Claim of Exemptions. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.[1]

(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

Rule 9006(b)(3), Federal Rules of Bankruptcy Procedure, provides in part:

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[1] The phrase "or supplemental schedules" was added to subsection (b) by the amendments to the Bankruptcy Rules, effective August 1, 1991.

(3) Enlargement Limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

Rule 9011, Federal Rules of Bankruptcy Procedure, provides in part:

(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or a party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable

expenses incurred because of the filing of the document, including a reasonable attorney's fee.

STATEMENT OF FACTS

This case presents the question of whether a trustee may recover property has been claimed as exempt when no one has ever objected and § 522(l) of the Bankruptcy Code, provides "unless a party in interest objects, what is claimed as exempt is exempt."

The property claimed as exempt was Emily Davis' ("Davis" or "debtor") pending lawsuit alleging employment discrimination against Trans World Airlines ("TWA"). In April of 1978, Davis filed a Complaint with the Pittsburgh Commission on Human Relations ("Commission"), alleging that TWA had discriminated against her by denying her promotions on the basis of her race and sex.

On December 16, 1980, the Commission entered an Order directing TWA to pay Davis "lost wages representing the difference between her salary as a Reservations Sales Representative and the salary of a Senior Sales Representative, the position she was denied because of unlawful discrimination from the period March, 1976 until the date TWA no longer employed Senior Sales Representatives in its Pittsburgh office." Joint Appendix ("Jt. App.") at 3. TWA no longer employed Senior Sales Representatives in the Pittsburgh office after substantial staff reductions in 1980. Jt. App. 59. According to Freeland & Kronz' estimate of damages prepared in May of 1987, Ms. Davis would have been entitled to between $7,665.00 and $11,223.00, depending on date in 1980 that these staff reductions

occurred.[2] Jt. App. 31.

TWA appealed the Commission's decision to the Court of Common Pleas of Allegheny County. Ms. Davis pledged forty-percent (40%) of the any recovery in the case to Freeland & Kronz as attorneys fees under a "contingency fee" agreement. Jt. App. 54. On September 23, 1981, the Court of Common Pleas reversed the Commission's liability decision. Appendix filed with the Third Circuit ("App."), at 111. Davis appealed to the Commonwealth Court of Pennsylvania, which, on June 27, 1983, reversed the Court of Common Pleas and reinstated the Commission's award. App. 125. TWA then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which was granted on November 18, 1983. App. 294.

Ms. Davis filed a voluntary petition under Chapter 7 of the Bankruptcy Code ("Code") on October 24, 1984. Jt. App. 55. On the schedules which she filed with her bankruptcy petition, Davis claimed the pending TWA lawsuit as exempt property under § 522(d) of the Code and listed it's value as unknown. Jt. App. 18. Her schedules list total liabilities of $11,270.37. Jt. App. 20.

On November 26, 1984, Petitioner Robert Taylor ("Taylor" or "trustee") was appointed trustee in the bankruptcy proceeding. Jt. App. 55. On January 4, 1985, Taylor conducted the meeting of creditors ("§ 341 meeting") Jt. App. 25. The trustee's handwritten notes made during the meeting, indicate that either Ms. Davis or her bankruptcy counsel said there was a *claim of $90,000.00 in the TWA*

[2] These estimates do not include interest. Jt. App. 31.

lawsuit. Jt. App. 26.

By letter dated January 7, 1985, Taylor advised Freeland & Kronz that he considered "the net proceeds of said suit would be an asset in the bankruptcy estate." He also asked about the status of the litigation. Jt. App. 27. An associate of Freeland & Kronz responded two days later and informed Taylor that "there was no way of ascertaining the value of the case ... other than by calculating back pay ... with interest ... $110,000 ... because of other variables and uncertainties, the possibility of a quick settlement is unlikely." Jt. App. 28.

Neither Taylor nor any creditor objected to the exemptions claimed by Ms. Davis before February 6, 1985, or ever. Jt. App. 55. The trustee didn't object because he thought the TWA lawsuit was a "nullity"; "that there would be no recovery." Jt. App. 58; App. 243. Ms. Davis received a discharge on October 16, 1985. Jt. App. 56.

On November 29, 1984, the Supreme Court of Pennsylvania, by an equally divided vote, affirmed the Commonwealth Court of Pennsylvania's decision in Ms. Davis' favor. Pet. App. 32a; App. 128-129. On March 25, 1985, the Supreme Court of Pennsylvania allowed TWA to reargue its appeal of the Commission's award, but on October 1, 1986, the Supreme Court held that reargument of the appeal had been improvidently granted and dismissed TWA's appeal. App. 141.

After a settlement conference with Commission officials in May of 1987, a hearing on damages was tentatively scheduled for July 9, 1987. App. 344. The

hearing was never held, because the parties settled the case. *Id.* On September 11, 1987, Davis executed a settlement agreement with TWA under which TWA was to pay her and her attorneys: $23,483.75 (less applicable withholding taxes) "as and for back pay or front pay," $23,483.75 "as and for all alleged tort claims or any other claims not represented [*sic*] asserted wage losses," and $63,032.50 "as and for attorney's fees and expenses ..." Jt. App. 42. The "back pay" portion of the settlement was paid directly to Emily Davis by TWA. App. 93, 275-276. Freeland & Kronz expended approximately $69,000.00 in time on the TWA lawsuit, billed at their hourly rate. Jt. App. 50. They retained $36,500.00 in cash and $7,500.00 in "travel vouchers" as their fee in the case. App. 49. *See also* Jt. App. 56.

In October, 1988, Taylor filed a complaint against Davis, Freeland & Kronz, Freeland, and Kronz seeking to recover $79,016.25 of the TWA settlement for the bankruptcy estate. App. 8-17. The trustee did not seek to recover the "back pay" portion of the settlement. App. 11-17. At trial, the only "expert" testimony on the "fair market value" of the TWA lawsuit was that of Richard Kronz and Wendell Freeland. They testified that the "fair market value" of the lawsuit, as of October 24, 1984, was $5,000 and $10,000, respectively. App. 358, 133-134; App. 369, 131, 132.

The bankruptcy court ordered that the defendants "return" $23,483.75 (plus interest) to the trustee. It held that (1) § 522(l) implicitly requires there be a statutory basis for the claimed exemption before the failure of any party in interest to timely object has effect, (2) § 522(l) incorporates by reference the provisions of § 522(b), which limits

exemptions to those available under federal, state, or local law, (3) there was "no statutory basis" under § 522(d) for exempting a "tort recovery", and (4) certain debtors of questionable integrity may be encouraged to claim all of their property as exempt in the hope that the trustee would fail to object. Pet. App. 38a-41a.

The district court affirmed the bankruptcy court's decision and followed its analysis. Pet. App. 18a-27a.

The Third Circuit reversed and held "in absence of an objection ... property claimed as exempt by the debtor is exempt. Pet. App. 9a. It also held that (1) the text of § 522(l) and Bankruptcy Rule 4003(b) "admits of no exceptions to the bright-line procedural rule," (2) "[n]othing in the legislative materials suggests that any exceptions to this bright-line rule were intended," (3) "the evolution of the bankruptcy laws suggests that Congress intended to shift the burden of objection from the debtor to the other parties in interest," (4) as a matter of policy, "[t]he time limits and obligations established by § 522(l) and Rule 4003(b) serve the dual purposes of finality and certainty," (5) Bankruptcy Rule 9011 "authorizes sanctions" for bad-faith exemption claims and "should act as the primary deterrent" against such crimes, and (6) § 522 (b) is not rendered superfluous by a literal reading of § 522(l), the bankruptcy court's reading of the statute would render § 522(l) meaningless. Pet. App. 11a-14a.

SUMMARY OF ARGUMENT

Section 522(l) of the Bankruptcy Code provides that "unless a party in interest objects, the property claimed as exempt ... is exempt." This language suggests no ambiguity; the legislative history of this provision suggests no contrary intention. The Bankruptcy Rules provide a strict thirty-day time limit for objecting to the debtor's claim of exemption and enlargement of this time period is severely limited. No one ever objected to Ms. Davis' claim of exemption in the TWA lawsuit. The exemption claim and objection procedure of the Code and Rules furthers the primary policy of bankruptcy law, that of a "fresh start" for the debtor.

Petitioner's argument that § 105(a) of the Code provides the authority for modifying the plain language of § 522(l) of the Code ignores the express limitation in the text of § 105(a); the limitation that the court's action is "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." Following the unambiguous Code and Rule provisions cannot, per se, be an "abuse of process." This argument also ignores the settled principle that the bankruptcy court must exercise its equity powers within the confines of the Code.

Petitioner's §105(a) argument is asserted late; it was not argued below nor in the Petition for Certiorari. Petitioner specifically relies on a 1986 amendment to § 105(a) which became effective in mid-1987. The amendment is not applicable to the debtor's claim of exemption in this case; that property was exempt over two years earlier under the plain language of § 522(l).

Petitioner's argument that the debtor's claim of exemption did not have a "colorable basis" is irrelevant and ignores the trustee's opinion of the value of the claim at the time he could have objected, the uncontroverted trial testimony and the undisputed uncertainties of the case on the date of the bankruptcy filing.

Freeland & Kronz should be allowed to retain their fee for producing something which the trustee, *now*, feels is valuable.

ARGUMENT

I. THE LANGUAGE AND HISTORY OF SECTION 522(l) OF THE BANKRUPTCY CODE AND RELATED RULES ARE CLEAR AND UNAMBIGUOUS - UNLESS OBJECTION, A CLAIM OF EXEMPTION IS VALID

A. The Text of the statute is clear

Statutory interpretation begins with language of statute itself. *Pennsylvania Dept. of Public Welfare v. Davenport*, 110 S.Ct. 2126, 109 L.Ed.2d 588, 595 (1990); *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 409 U.S. 296, 300, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318, 326 (1989).

The rationale for starting with the language of the statute is "there is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to it's wishes." *United States v. American*

Trucking Assns., Inc., 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345, 1350-1351 (1940). *See Caminetti v. United States*, 242 U.S. 470, 490, 37 S.Ct. 192, 196, 61 L.Ed. 442, 455 (1917); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980-981 (1982).

Section 522(l) of the Code provides in part:

> The debtor shall file a list of property that the debtor claims as exempt ... *(U)nless a party in interest objects, the property claimed as exempt on such list is exempt.*

11 U.S.C. § 522(l)(1988). (Emphasis added.)

This provision sets up a simple procedure for determining what property of the debtor is exempt - the debtor makes a claim of exemption, a party in interest may object.[3] The text does not specify the procedure if an

[3] By use of the term "claim" and by setting up a claim - objection procedure, Congress clearly assumes that debtors may sometime make claims of exemption that are incorrect or legally defective. The procedural remedy for an invalid claim is objection. The trustee or any creditor may object. Federal Rule of Bankruptcy Procedure 4003(b).

objection is made[4], it clearly specifies the result if there is no objection.

Initially, the Court employs a two part inquiry in construing statutes:

1) Has Congress spoken on the subject?

In construing statutes, the Supreme Court begins with language of statute and asks whether Congress has spoken on subject. *Norfolk and Western Ry. Co. v. American Train Dispatchers Assn.* 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991); and

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[4] The procedure once an objection is filed is set forth in Federal Rule of Bankruptcy Procedure 4003(b)-(c), which provides in part:

> The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors ... unless, within such period, further time is granted by the court ... After hearing on notice, the court shall determine the issues presented by the objections.

Federal Rule of Bankruptcy Procedure 9006(b)(3) limits the bankruptcy court's authority to enlarge the time for taking action under Rule 4003(b) to "only to the extent and under the conditions states in those rules."

2) if it has spoken, is what Congress said clear[5] or unambiguous?

If intent of Congress is clear, that is end of matter, for the Court must give effect to unambiguously expressed intent of Congress. *Norfolk and Western Ry. Co. v. American Train Dispatchers Assn.*, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95, 106 (1991).

Congress has spoken on the effect of no objection to a debtor's claim of exemption: "*Unless a party in interest objects, the property claimed as exempt ... is exempt.*"

This language is unambiguous. The text has an almost mathematical precision.[6] It is expressed in absolute terms; Congress delineated no exceptions. Petitioner has not argued otherwise.

When the Court finds the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances, such as where application of the

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[5] Plain meaning of legislation should be conclusive, except in rare cases in which literal application of statute will produce result demonstrably at odds with intention of its drafters; in such cases, the intention of drafters, rather than strict language, controls. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 131, 103 L.Ed.2d 290, 299 (1989).

[6] In mathematical or logical terms, the sentence is a conditional equation: "if N, then C=E," where N=no objection, C= the claim of exemption and E=exempt.

statute as written[7] will produce result demonstrably at odds with intentions of its drafters. *Demarest v. Manspeaker*, 111 S.Ct. 599, 604, 112 L.Ed.2d 608, 616, on remand 930 F.2d 33 (1991). *Burlington Northern R. Co. v. Oklahoma Tax Commn.*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860 (1987). *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980-981 (1982).

There has been no demonstration that the result produced in this case is at odds with the intention of the drafters. The intention of the drafters, clearly expressed in the language of the statute, was unequivocal. The legislative history confirms it.

B. Legislative History of Section 522(l) is clear

Though legislative history can be legitimate guide to statutory purpose obscured by ambiguity, the language of statute itself must ordinarily be regarded as conclusive, absent any clearly expressed legislative intention to contrary. *Burlington Northern R. Co. v. Oklahoma Tax Commn.*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404, 412 (1987).

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[7] "...where acceptance of that meaning . . . would thwart the obvious purpose of the statute." *Commissioner v. Brown*, 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75, 82 (1965); *Helvering v. Hammel*, 311 U.S. 504, 510-511, 61 S.Ct. 368, 371, 85 L.Ed.2d 303, 307 (1941); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973, 980-981 (1982).

The legislative history, while limited[8], contains no contrary intention. The House Report states:

> Subsection (l) requires the debtor to file a list of property that he claims as exempt from property of the estate. *Absent an objection to the list, the property is exempted*. A dependent of the debtor may file it and thus be protected if the debtor fails to file the list.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 363, (1977) *reprinted* in 1978 U.S. Code Cong. & Admin. News 5963, 6319. (Emphasis added.)

The Senate Report is virtually identical, it states:

> Subsection (k) requires the debtor to file a list of property that he claims as exempt from property of the estate. *Absent an objection to the list, the property is exempted*. A dependent

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[8] Congress worked on the formulation of the Code for nearly a decade. It was intended to modernize the bankruptcy laws, see H.R. Rep. No. 95-595, 3 (1977) *reprinted* in 1978 U.S.Code Cong. & Admin.News 5963, 5964-5965, and as a result made significant changes in both the substantive and procedural laws of bankruptcy ... In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 297-298 (1989). *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53, 102 S.Ct. 2858, 2961-2862, 73 L.Ed.2d 598, 603 (1982) (plurality opinion).

> of the debtor may file it and thus be protected if the debtor fails to file the list.

S. Rep No. 989, 95th Cong., 2d Sess. 77, (1977) *reprinted* in 1978 U.S. Code Cong. & Admin. News 5787, 5863. (Emphasis added.)

The reports paraphrase the plain language of § 522(l) of the Code. They express no contrary intention.

C. There are sound policy reasons for a strict exemption procedure

No occasion exists to examine additional considerations of policy that may have influenced lawmakers in the formulation of a statute, if the language or provision is sufficiently clear in its context and not at odds with legislative history. *Rodriguez v. U.S.*, 490 U.S. 522, 526, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533, 538 (1987).

1. The Code's policy is a "fresh start" for the debtor

One of the primary purposes of bankruptcy is to provide a "fresh start" to debtors. *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1706, 29 L.Ed 2d 233, 241 (1971).

The House Report to the Code states in part:

> The historic purpose of these exemption laws have been to protect the debtor from his creditors, to provide him with the basic necessities of life so even if creditors levy on all of his non-exempt property, the

> debtor will not be left destitute and a public charge ... (T)he bill continues to recognize the state's interest in regulating credit within the states, but enunciates a bankruptcy policy favoring a fresh start ... Bankruptcy exists to provide relief for an overburdened debtor.[9]

The purpose of exemptions is to allow the debtor to retain a minimal amount of property for his fresh start. *Van Iperen v. Production Credit Assn. of Worthington-Slayton Branch (In re Van Iperen)*, 819 F.2d 189, 191 (8th Cir.1987); *see In re Hindman*, 104 F. 331, 333 (9th Cir. 1900).

The exemption procedure Congress created with §522(l) and Bankruptcy Rule 4003(b)(3) offers certainty and finality which is particularly acute in the bankruptcy context. Pet. App. 12a. This procedural scheme provides certainty for both the debtor and the trustee. The debtor must begin his fresh start and must know what property he has available to this end. The trustee must administer assets according to the Bankruptcy Code; the procedural rules, thus, mandate a conclusion which makes imminently good sense, given the framework which the Code establishes for administering assets of the estate. *Doyle v. Grossman (In re Grossman)*, 80 B.R. 311, 314 (Bankr. E.D.Pa. 1987).

2. The Rules further the Code's policy of a "*fresh* start"

Petitioner suggests that the Third Circuit's construction of § 522(l) would create "manifest inequities" between the

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[9] H.R. Rep. No. 595, 95th Cong., 2d Sess. 126, (1977) *reprinted* in 1978 U.S. Code Cong. & Admin. News 5963, 6087.

treatment of debtors and creditors under the bankruptcy rules because they allow latitude to the debtor in amending his schedules while there are strict time limits on a creditor's objection to the claim of exemption. Petitioner's Brief ("Pet. Brief __."), p. 27-28.

> Rule 4003(b) provides, however, that:
>
> The trustee or any creditor may file objections to the list of property claimed as exempt within thirty days after ... *the filing of any amendment to the list* ...

Federal Rule of Bankruptcy Procedure 4003(b). (Emphasis added.)

If a debtor amends his claim of exemption, a creditor or trustee has thirty days from the date of amendment to object to the claim. The rule, while strict, does allow extension if "within such period further time is granted by the court."[10] The thirty-day time limit is liberal, given other time limits in the bankruptcy rules. For example, under Rule 8002(a), the time period for filing a notice of appeal from any order of the bankruptcy court is ten days.

The drafters of the rules intended a strict time limit for objections to exemptions. Federal Rule of Bankruptcy

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[10] A trustee who was seriously concerned about a claim of exemption could, as an alternative to objection or extension, "continue" the "section 341" meeting. Generally, he is the presiding officer of the meeting. This action would effectively "toll" the running of the thirty day period for objection. The period begins at the "conclusion" of the meeting. *See* Federal Rule of Bankruptcy Procedure 4003(b).

Procedure 9006(b)(3) provides in part:

> The court may enlarge the time for taking action under Rules ... 4003(b) ... *only to the extent and under the conditions stated in those rules.*

(Emphasis added.)

Rule 9006(b)(3) strictly limits the court's authority to enlarge the time limit for objecting to a claim of exemption. The Court should seek to interpret the rules neither liberally nor stingily but only as best we can according to their apparent intent. Where there intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319, 108 S.Ct. 2405, 2410, 101 L.Ed.2d 285, 293 (1988).

If there is "unequal" treatment of debtors and creditors related to claims and objections to exempt property, the rules clearly intended it.

3. There are Sanctions available for "unwarranted" claims of exemption

Petitioner also argues that the lower court's construction of § 522(l) would encourage debtors to claim all their property as exempt in the hope that no party in interest would object. Pet. Brief 29. This argument ignores all practical considerations.

It is, in reality, the debtor's lawyer who makes a claim to exemption for his client. No debtor's lawyer would

presume that a trustee selected by the Office of United States Trustee would be incompetent to review a debtor's claim of exemption. Even if the trustee missed a spurious claim, all creditors in the case would have to do likewise. In almost all cases, making a spurious claim would be a useless and time consuming activity which could lead to sanctions.

Petitioner argues that Federal Rule of Bankruptcy Procedure 9011(a) would not be a source of sanctions for making unwarranted claims of exemption because the rule is not applicable to "lists, schedules and statements." Pet. Brief 28-29.

This is not a proper construction of Rule 9011(a).

Rule 9011 provides in part[11]:

> [1] *Every petition, pleading, motion and other paper* served or *filed in a case* under the Code on behalf of a party represented by an attorney, *except a* list, *schedule*, or statement, or amendments thereto, *shall be signed by at least one attorney of record* in the attorney's individual name, whose office address and telephone number shall be stated ... [3] *The signature of* an attorney or *party constitutes a certification that* the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information and belief formed after reasonable inquiry

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[11] (Emphasis added.) Full text of this rule is at p. 10, supra. The number of the sentence is included in brackets to aid in comparing this rule with Federal Rule of Civil Procedure 11(a). The relevant portion of Rule 11(a) is listed in the note 13, *infra*.

> it is well-grounded in fact and *warranted by existing law or good-faith argument for the modification or reversal of existing law* . . . [5] If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose sanctions on the person who signed it . . .

The first sentence of Rule 9011(a) specifies what documents shall be signed by an attorney and excludes "lists, *schedules* and statements." Bankruptcy schedules, including schedule "B-4" where the debtor must make his claim of exemption, must be verified or contain an unworn declaration of the debtor. Federal Rule of Bankruptcy Procedure 1008; Official Form 6[12].

The reasonable construction of Rule 9011(a) is that the third sentence of the rule is not limited by the first sentence. The first sentence specifies only what documents an attorney must sign. The third sentence, by its terms, deals with documents a party *or* an attorney signs, *whether required to or not*. A party is subject to sanctions if a claim made in schedule is not warranted by existing law or good-faith argument for the extension, modification or reversal of existing law. An attorney does not have to sign the schedules under the rules, if he does, he is subject to sanctions.

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[12] This is the form Ms. Davis used. Jt. App. 5-21. The Official Forms were substantially revised in amendments to the Federal Rules of Bankruptcy Procedure which became effective on August 1, 1991.

The Court found that this was the proper construction of Federal Rule of Civil Procedure 11(a)[13], which is very similar to Bankruptcy Rule 9011, stating:

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[13] Federal Rule of Civil Procedure 11 provides in part:

> [1] Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [2] The party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. [3] Except when otherwise specifically provided by rule or statute pleadings need not be verified or accompanied by an affidavit. [4] The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or one witness sustained by corroborating circumstances is abolished. [5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry is well-grounded in fact and is warranted by existing law or good-faith argument for extension, modification or reversal of existing law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in cost of litigation. ... [7] If a pleading, motion, or other rule is signed in violation of this rule, the court, on motion or on its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction ...

> This *(fifth)*[14] sentence, by its terms governs any signature of "an attorney or a party," thereby making it applicable not only to signatures required by sentences [1], [2], and [3], but also to the signatures that are not required but nevertheless present.

Business Guides Inc. v. Chromatic Communication Enterprises, Inc., 111 S.Ct. 922, 929, 112 L.Ed.2d 1140, 1153 (1991). (Parenthetical added.)

There are other sanctions available in addition to those

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[14] The fifth sentence of Federal Rule of Civil Procedure 11(a) and the third sentence of Federal Bankruptcy Rule of Procedure 9011(a) are nearly identical.

Rule 11(a) provides:[5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry is well-grounded in fact and is warranted by existing law or good-faith argument for extension, modification or reversal of existing law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in cost of litigation.

Rule 9011(a) provides: [3] The signature of an attorney or party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information and belief formed after reasonable inquiry is well-grounded in fact and warranted by existing law or good-faith argument for the modification or reversal of existing law and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation.

available under Rule 9011(a). Section 727(a) of the Code provides in part:

> The court shall grant the debtor a discharge unless -
> (4) the debtor knowingly and fraudulently, in or in connection with the case -
> (B) presented or used a false claim.

11 U.S.C. § 727(a) (1988). In addition, 18 U.S.C. § 152, provides in part:

> Whoever knowingly and fraudulently ... receives or attempts to obtain any money or property ... advantage or promise thereof, for acting or forebearing to act in any case under Title 11 ... shall be fined not more than $5,000 or imprisoned not more than five years or both.

Debtors and their counsel have no incentive to make a spurious exemption claims, it would be a useless activity that could leave them open to numerous sanctions including the denial of discharge, *the very reason for the bankruptcy filing* in most instances.

4. Other policy concerns

The Seventh Circuit expressed another policy concern petitioner has not discussed:

> It would be questionable policy to allow the trustee to hang back while the debtor goes forward with his ... claim and then subsequently object to the inclusion of these claims in exempt property.

In re Brandstaetter, 767 F.2d 324, 328 (7th Cir. 1985).

It would be an outrageous policy to allow the trustee, who never sought to engage Freeland & Kronz to prosecute the lawsuit on behalf of the estate[15], to deprive Freeland & Kronz of their fees for successfully prosecuting the TWA lawsuit.

II. SECTION 105(a) OF THE BANKRUPTCY CODE SHOULD NOT BE CONSTRUED TO MODIFY THE PLAIN LANGUAGE OF SECTION 522(l) AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 4003(b) AND 9006(b)(3).

Petitioners argue that § 105(a) of the Bankruptcy Code should be read to modify § 522(l) and the related time limits for objecting to a claim of exemption ("the § 105 (a) argument"). Pet. Brief 22-28.

A. The § 105(a) Argument is asserted Late in these Proceedings

The Court could decline to consider petitioner's "§ 105(a) argument" as it was not raised below and was not

[15] Jt. App. 59.

raised in the Petition for Certiorari.[16] *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277, 109 S.Ct. 2909, 2921, 106 L.Ed.2d 219, 239 (1989).

B. The Amendment to § 105(a) was too late to apply to Ms. Davis' claim of exemption

Petitioner specifically argues that the second sentence of § 105(a), authorizes the bankruptcy court to prevent an "abuse of process", like Ms. Davis' claim of exemption.[17] Pet. Brief 25-27. The trustee argues that the second sentence of § 105:

> ... is clearly applicable to this case because § 302(d) of the Act -- which governs, *inter alia*, "[t]he judicial districts established for the State of Pennsylvania" -- provides that amendments which the Act makes to § 105 shall become applicable "to cases while pending

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[16] *See* Taylor's Petition for Writ for Certiorari and Brief of Appellee, Taylor v. Freeland & Kronz, No. 90-3693 (3d Cir. July 8, 1991). The trustee argues that the court below did not even mention § 105(a) of the Bankruptcy Code in its Opinion. Pet. Brief 24. The court below did not mention §105 because no party raised the issue.

[17] Respondents challenge this characterization of Ms. Davis' claim of exemption, *infra*.

in such district"[18] no later than 270 days anter the effective date of the Act (November 26, 1986). 100 Stat. 3120.

Pet. Brief 25.

Ms. Davis claimed her exempt property on October 24, 1984. Jt. App. 55. On January 4, 1985, the trustee conducted a "§ 341(a) meeting" which was attended by Ms. Davis and her bankruptcy counsel, Alan Berman. Jt. App. 55. Rule 4003(b) requires that objection be made "within 30 days after the conclusion of the meeting of creditors ... unless, within such period further time is granted by the court." Neither the trustee nor any party in interest ever objected to the debtor's claim of exemption. Jt. App. 55.

On February 6, 1985, over two years before the amendment to § 105(a) became effective, under the mandate of § 522(l) of the Code, the debtor's claim of exemption "was exempt." On October 16, 1985, Ms. Davis received a discharge by Order of the Bankruptcy Court. Jt. App. 56. The court did not raise a "sua sponte" objection to the

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[18] The actual language of Section 302 of Pub. L. 99-554 provides in part:

The amendments made by subtitle A of title II of this Act [... amending sections ... 105 ...of Title 11] ... *shall not*--
(i) become effective in or with respect to a judicial district ... until, or
(ii) *apply to cases while pending in such district before*, the expiration of the 270 day period beginning on the effective date of this Act ...

100 Stat. 3088, 3120 (1986). (Emphasis added.)

exemption claim nor was the time period for objection enlarged by the court before February 6, 1985, pursuant to Rule 9006(b)(3).[19]

Even if § 105(a) were construed to enlarge the time for objecting under Rule 4003(b), the Court would have to retroactively apply the second sentence of § 105(a) to reach the result urged by the trustee. Congressional enactments will not be construed to have retroactive effect unless their language requires this result. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

C. Following the Code and Rules is, *per se*, not an "abuse of process"

The plain language of § 105(a) does not support petitioner's construction. It provides:

> The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination *necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process*.

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[19] Rule 9006(b)(3) provides in part:

The court may enlarge the time for taking action under Rules ... 4003(b) ... only to the extent and under the conditions stated in those Rules.

11 U.S.C. § 105(a)(1988). (Emphasis added).

The first part of the second sentence of § 105(a) is limited by the later phrase "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

The bankruptcy court took no "sua sponte" action on the debtor's claim of exemption. There was no prior court order to enforce. The bankruptcy court issued an opinion and order in an case commenced over three and a half years after the objection period had run under the rules.

The court's action is not necessary or appropriate to enforce or implement the rules, it was in clear violation of Rule 4003(b) and 9006(b)(3).

Petitioners argue that it was, however, necessary or appropriate to prevent an "abuse of process." Pet. Brief 25. The trustee admits that the term "abuse of process" is not defined in the Code and that the legislative history "suggests that Congress wished to clarify the broad powers of bankruptcy courts to protect the integrity and effectiveness of the process." Pet. Brief 25.

Following the plain meaning of the rules and the Code, is not, by definition, an "abuse of process".[20] The Code and rules were designed to protect the integrity and

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[20] If anything, ignoring the Code and rules is an "abuse of process". "Abuse of process is often defined under state law as a "perversion of the of the court system". *See e.g. Baird v. Aluminum Seal Co.*, 250 F.2d 595 (3d Cir. 1958).

effectiveness of the bankruptcy process; they are the "process".

D. Congress did not amend § 522(l) of the Code when they amended § 105(a)

Petitioners further argue that:

> Construing 522(*l*) as the court did below would encourage the debtors "to claim all property as exempt in the hope that no party in interest would object." It is undoubtedly for just such reasons that Congress enacted § 105, which permits bankruptcy courts to prevent such abuses of the judicial process.

If Congress wanted to modify the objection procedure to remedy an alleged evil they saw in it, they would have undoubtedly amended § 522(l) of the Code when they amended § 105(a). They did not.

The Court assumes that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). The purpose of a statute includes not only what it sets out to change but also what it resolves to leave alone. *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68, 83 (1991); *Rodriguez v. United States*, 490 U.S. 522, 526, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533, 538 (1987).

E. The Legislative History of § 105(a) of the Code is general

The purpose of § 105(a) is to confirm that the

bankruptcy court retains its traditional equity powers under the Code.

The House Report provides in part:

> Section 105 is derived from § 2(a)(15) of present law with two changes ... § 105 is similar in effect to the All Writ Statute ... this section is *repeated here for the sake of continuity from current law* and ease of reference, and to *cover any powers traditionally exercised by a bankruptcy court* that are not encompassed by the All Writ Statute.

H.R.Rep. No. 595, 95th Cong., 2d Sess. 316 (1977) *reprinted* in 1978 U.S.Code Cong. & Admin. News 5963, 6273-6274. (Emphasis added.)

The amendment to § 105(a) has a sparse legislative history. Petitioner quotes the remark of Senator Hatch[21] that:

> This bill allows the Bankruptcy Court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner.. 132 Cong. Rec. 28610 (daily ed. Oct. 3, 1986).[22]

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[21] The Court does not permit the unambiguous language of a statute to be expanded or contracted by the statements of individual legislators or committees during the enactment process. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989).

[22] Pet. Brief 26.

To ignore § 522(l) of the Code can not be called "proper and justified". To ignore the strict time limits of the Rules will not "expedite a case". This case is a good example.

Ms. Davis has been denied the "fresh start" the bankruptcy laws purported to offer her.[23] This is not "expedited" treatment. Petitioner's construction of the Code and Rules will not expedite cases, it will have the opposite effect.

The equity powers of the bankruptcy courts have limits. They "must and can only be exercised within the confines of the Bankruptcy Code." *In re Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 968-969, 99 L.Ed.2d 169, 179 (1988). Section 105(a) cannot properly be read to ignore the clear provisions of the Code and rules; it contains an express limitation to prevent such a construction.

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[23] Ms. Davis had her bank account attached shortly before Christmas of 1991 pursuant the judgement which, effectively, denied her the exemption claim she made seven years earlier. Ms. Davis may be forced into a second bankruptcy in an attempt limit the adverse impact of her first bankruptcy. *Fresh start, indeed!*

III. EMILY DAVIS' CLAIM OF EXEMPTION WAS IN GOOD FAITH BECAUSE THE AMOUNT, IF ANY, OF A RECOVERY FROM TWA WAS UNCERTAIN.

A. *"Albeit barely"* [24] - The Liability Aspect of the TWA Lawsuit was uncertain on October 24, 1984; the Trustee thought so.

Now armed with the benefit of perfect hindsight[25], petitioner argues:

> (I)t was clear when she *(Davis)* filed her schedules that only a limited portion of the proceeds recovered could be exempted under § 522(d).

Pet. Brief 30. (Parenthetical added.)

Property claimed as exempt is valued as of the date of the filing of the bankruptcy petition. Section 522(a)(2) of the Code states, in part: " In this section- ... "Value" means fair market value as of the date of the filing of the petition ... 11 U.S.C. § 522(a)(2)(1988).

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[24] A phrase used by Justice Hutchinson of the Supreme Court of Pennsylvania to describe the sufficiency of the evidence to support the finding of discrimination in the TWA lawsuit. Jt. App. 24; App. 130.

[25] The trustee's ability predict the outcome of the TWA lawsuit is significantly improved now that he knows the result of the case. ***But see***, his trial testimony wherein he describes the TWA lawsuit as a "nullity". Jt. App. 58.

Ms. Davis filed her bankruptcy petition on October 24, 1984. Jt. App. 55. As of her bankruptcy filing, the liability and damages aspects of Ms. Davis' lawsuit were uncertain. On October 24, 1984, Ms. Davis' liability case was on appeal to the Supreme Court of Pennsylvania. App. 360. The liability case had a "seesaw" history prior to the Supreme Court of Pennsylvania's allowance of appeal.[26] Ms. Davis had seen the liability determination in her case reversed once by October 24, 1984. She knew the outcome of her case was uncertain; she claimed the value of the TWA lawsuit as "unknown" in her Schedule B2 and B4. Jt. App. 15, 18.

Petitioner has repeatedly argued that, as of her bankruptcy filing, Ms. Davis "apparently viewed her Commission claim as having a *value* in the area of $100,000.00." Pet. Brief 32.[27]

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[26] The Pittsburgh Commission on Human Relations had found in Ms. Davis' favor. Pet. App. 32a; App. 101-102. The Commission's decision was reversed by Opinion and Order of Judge Papadakos of the Court of Common Pleas of Allegheny County, Pennsylvania on September 23, 1981. Pet. App. 32a; App. 103, 111. The Commonwealth Court reversed the decision of the Court of Common Pleas and reinstated the decision of the Commission on June 27, 1983. Pet. App. 32a; App. 112, 127. On October 24, 1984, former Judge Papadakos, who had reversed the Commission's Order, was now sitting as a Justice of the Supreme Court of Pennsylvania.

[27] Petitioner relies, in Note 4 and 17 of his Brief, on the bankruptcy court's "finding" that "either Ms. Davis or the attorney representing her in the bankruptcy proceeding estimated, on January 4, 1985, that the lawsuit was worth $90,000.00" *But see*, Jt. App. 26; App. 232-233.

There is no support in the record for this assertion. Neither Ms. Davis nor her bankruptcy attorney estimated that the TWA lawsuit was worth $90,000.00 at the "§ 341 meeting." The bankruptcy court was simply mistaken on this issue. The trustee's handwritten notes, made during the § 341 meeting, indicate that either Ms. Davis or her bankruptcy counsel said there was a *claim of $90,000.00 in the TWA lawsuit*. Jt. App. 26. The trial testimony indicates the same. App. 232-233.

The trustee shared Ms. Davis' view that the outcome of the case was uncertain. When he was asked whether there was any discussion at the "creditors' meeting" as to why he was going forward with this bankruptcy when he had a potential recovery of $90,000 from the TWA lawsuit, Taylor replied:

> The answer I recall receiving from either from Mr. Berman or Ms. Davis was the uncertainty as to the possible recovery and amount, so with that information, I have had past experience in examining debtors, many of them ... indicate they have potential lawsuits. And many of them do not turn out to be advantageous ...

Jt. App. 52.

At trial, the bankruptcy judge examined the trustee on this issue:

> Q: (By the Court) So you thought about objecting to exemptions, determined not to because this lawsuit might be a nullity. What do you mean by nullity?

A: (Taylor) That there would be no recovery.

Jt. App. 58; App. 243.

Petitioner can not equitably argue that Ms. Davis' claim of exemption in the TWA lawsuit was "improper" or made in "bad faith" when the trustee believed that the lawsuit had little value.[28]

The events after October 24, 1984, confirm that liability on the TWA claim was a "close question". The Supreme Court of Pennsylvania, by an equally divided vote, affirmed the Commonwealth Court's decision in Ms. Davis' favor. Pet. App. 32a; App. 128-129. The deciding vote in Ms. Davis' favor was cast by Justice Hutchinson, who wrote:

> On the particular facts of this case I believe the evidence is sufficient, *albeit barely*, to support the ... Commission's findings of discrimination ...

Jt. App. 24; App. 130. (Emphasis added).

Liability was not finally established until October 1, 1986, because, after the November 29, 1984 decision, the Pennsylvania Supreme Court granted TWA's Application for Reargument "out of time". The case was reargued on September 26, 1986. Pet. App. 32a. The Supreme Court

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[28] If the trustee considered the claim had little value, Ms. Davis' chances of a bank buying her claim or allowing her to borrow against her claim were minimal; so therefore, was the "fair market value" of her claim.

then dismissed the appeal on October 1, 1986. Pet. App. 33a.

B. *"Dead in the water"* [29] - On October 24, 1984, Ms. Davis' Damages In the TWA Lawsuit were Limited.

On October 24, 1984, the damages aspect of the TWA case was also uncertain. The Commission's Order of December 16, 1980, directed TWA to pay Ms. Davis:

> Lost wages representing the difference between her salary as a Reservations Sales Representative and the salary of a Senior Sales Representative ... from the period March, 1976 until the date TWA no longer employed Sales Representatives in the Pittsburgh office.

Jt. App. 3. TWA no longer employed Senior Sales Representatives in the Pittsburgh office after substantial staff reductions in 1980. Jt. App. 59. TWA did not provide some of the wage information needed for this calculation of damages until the spring of 1987. App. 298-301.

According to Freeland & Kronz' estimate of damages prepared in May of 1987, Ms. Davis would have been entitled to between $7,665.00 and $11,223.00, depending on

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[29] A phrase that Richard Kronz used to describe the potential effect of the 1980 TWA staff reductions in Pittsburgh on Ms. Davis' damages in the TWA lawsuit. Jt. App. 59.

date in 1980 that these staff reductions occurred.[30] Jt. App. 31.

Petitioner admits that Ms. Davis was entitled to a "catch-all" or "wildcard" exemption for any property up a value of $3,950.00 under § 522(d)(5) of the Code.[31] Pet. Brief 32-33 and Note 16. In addition, Ms. Davis pledged forty-percent (40%) of the recovery to Freeland & Kronz as attorneys fees under a "contingency fee" agreement.[32] Jt.

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[30] These calculations do not include interest. The $7,665.00 figure is arrived at by adding the 1977, 1978 and 1979 "back-pay" figures. Jt. App. 31. The $11,223.00 figure is calculated in the same manner but adds "back-pay" for the entire year of 1980. Jt. App. 31.

[31] The trustee also admitted that the "future earning" or "front pay" portion of the settlement was not property of the estate. Jt. App. 63-64. The only damages claimed in the TWA lawsuit as of May of 1987, other than "front pay" and "attorneys fees", were for "back pay" and "pension loss". App. 339. "Pension loss" is exempt under 522(d)(10)(E) of the Code. The trustee has not sought to recover the "back pay" component of the settlement in this action. App. 11-17. *See also* Note 36, *infra*.

[32] In the lower courts, Respondents argued that Freeland & Kronz had an "equitable charging lien" under Pennsylvania state law which would protect their contingent fee. *See Rect vs. Urban Development Authority*, 402 Pa. 599, 168 A.2d 139 (1961); *Novinger v. E.I Dupont DeNemouers & Co.*, 809 F.2d 212, 218 (3d Cir. 1967); *United States v. Fidelity Philadelphia Trust Co.*, 459 F.2d 71 (3d Cir. 1972); *In re Prudence*, 46 F.2d 157 (2d Cir. 1938). This is a lien which the trustee cannot avoid. *In re Fitterer Engineering Associates, Inc.*, 27 B.R. 878, 880 (Bankr. E.D. Mi. 1983); *In re Life Imaging Corporation*, 31 B.R. 101 (Bankr. D. Colo. 1983); *In re Sea Catch*, 36 B.R. 226, 233 (Bankr.

App. 54.

Based on her attorneys estimate of damages, the 1980 Commission Order, Ms. Davis's entitlement to a "wild card" exemption and Freeland & Kronz' attorneys fee lien, the trustee *may* have realistically recovered, between:

Description	Estimate 1	Estimate 2
Gross Recovery[33]	$ 7,655.00	$11,223.00
Attorneys Fees (40%)	- 2,286.00	- 4,489.00
Subtotal:	$ 4,239.00	$ 6,534.00
"Wild Card" Exemption	- 3,950.00	- 3,950.00
Nonexempt Proceeds	$ 289.00	$ 2,584.00

These estimates do not include out-of-pocket expenses which were $689.51 on settlement. Jt. App. 51. Nor do they include discounting the value of the lawsuit because of uncertain liability.

At trial, the only "expert testimony" on the "fair market value" of the TWA lawsuit was that of Richard Kronz and Wendell Freeland.[34] They testified that the "fair market value" of the lawsuit, as of October 24, 1984, was $5,000

D. Ala 1983). The Third Circuit did not decide this issue. Pet. App. 15a.

[33] The source of the two "gross recovery" figures is explained in Note 30, *supra*.

[34] The trustee stipulated to Mr. Freeland's "expert qualifications" at trial. App. 362.

and $10,000, respectively. App. 358, 133-134; App. 369, 131, 132. No other valuation testimony was presented at trial.[35]

Given the uncertainties of the TWA lawsuit on the date of her bankruptcy filing, Ms. Davis' claim of exemption was made in "good faith". If anything, the trustee's argument to the contrary is not.[36] Depending the fair market value of the lawsuit on October 24, 1984, it is unclear whether the trustee could have recovered anything for the bankrupt's estate, had he objected. He did not.

Freeland & Kronz did not advise Ms. Davis' on her claim of exemption, she was represented by other counsel. Jt. App. 56. Freeland & Kronz simply did their job and they did it well under the circumstances.

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[35] The Third Circuit did not decide whether the bankruptcy court erred in it's valuation finding(s), as respondents alleged. Pet. App. 15a.

[36] The petitioner argues that there is "no basis under § 522(d) for exempting 'back pay' awards ..." Pet. Brief 31. The trustee did not seek to recover the "back pay" portion of the settlement in his adversary proceeding Complaint. App. 11-17. Freeland & Kronz had no "transferee liability" on this portion of the settlement under § 550 of the Code as the "back pay" portion of the settlement was directly paid to Emily Davis by TWA. App. 93, 275-276.

They should be allowed to retain their fees[37] for doing so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[37] Freeland & Kronz expended approximately $69,000.00 in time on the TWA lawsuit, billed at their hourly rate. Jt. App. 50. They retained $36,500.00 in cash and $7,500.00 in "travel vouchers" as their fee in the case. App. 49. *See also* Jt. App. 56.